Supreme Court, U.S.
FILED
JUN 6 1991
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NO. 90 - 1616

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF OHIO,
Petitioner,

v.

LARRY WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

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The Respondent has raised several points in his brief in opposition to which the State feels compelled to respond.

I. THE OPINION OF THE SUPREME COURT OF OHIO IS NOT BASED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The Respondent erroneously asserts that the opinion of the court below is based on adequate and independent state grounds. This simply is not true. The Respondent urges that this Court is without jurisdiction because the opinion of the court below refers not only to the Fourth Amendment to the United States Constitution but also to Article I, § 14 of the Ohio Constitution. The Respondent obviously believes that this "dual reference" manifests the lower court's intention to rest its decision on state law. However, the State submits that neither the syllabus to the court's opinion nor the body of the opinion itself contains any "plain statement" manifesting such an intent. See *Michigan v. Long*, 463 U.S 1032 (1983). In fact, the State submits that this "dual reference" implies a contrary intent.

In *New York v. P. J. Video, Inc.*, 475 U.S. 868 (1986), this Court rejected an argument identical to that put forward by the Respondent here. In that case, the respondent argued that the decision of the New York Court of Appeals rested on the New York Constitution and various state court decisions, and that this Court therefore lacked jurisdiction to review that decision. This Court, referring to its opinion in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), stated that,

> We will not assume that a state-court decision rests on adequate and independent state grounds when the state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion. *Id.* at 327, quoting *Long*, supra.

That the Supreme Court of Ohio felt compelled to reach its decision because of federal law requirements will be made clear in the following analysis.

There exists in Ohio case law not a single case which even remotely suggests that Ohio courts are inclined to grant citizens

greater protection under the state constitution than is provided under the federal constitution where search and seizure issues are concerned. In fact, the Supreme Court of Ohio has made it clear in past opinions that Article I, § 14 of the Ohio Constitution and the Fourth Amendment are identical in scope. See, e.g., *State v. Wimoth*, 22 Ohio St. 3d 251, 490 N.E.2d 1236 (1986); *State v. Spaw*, 18 Ohio App. 3d 77, 480 N.E.2d 1138 (1984).

Furthermore, it has been a long-standing practice in Ohio to apply the exclusionary rule mandated upon the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), only in cases where violations of a constitutional nature are involved. The Supreme Court of Ohio made this axiom clear in *Kettering v. Hollen*, 64 Ohio St. 2d 232, 416 N.E.2d 598 (1980). In that case, the court stated,

> The exclusionary rule has been applied by this court to violations of a constitutional nature only. In *State v. Myers*, (1971), 26 Ohio St. 2d 190, 196, this court enunciated the policy that the exclusionary rule would not be applied to statutory violations falling short of constitutional violations, absent a legislative mandate requiring the application of the exclusionary rule. In *State v. Downs* (1977), 51 Ohio St. 2d 47, 63-64, the violation of Crim. R. 41 with respect to the return of a search warrant was described as non-constitutional in magnitude and the exclusionary rule was not applied. Also, in *State v. Davis* (1978), 56 Ohio St. 2d 51, it was held that fingerprint evidence obtained in violation of a statute does not have to be excluded.
>
> It is clear from these cases that the exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights. *Id.* at 234-235.

This reasoning was followed in subsequent cases as well. See, e.g., *State v. Unger*, 67 Ohio St. 2d 65; 423 N.E.2d 1078 (1981); *State v. Geraldo*, 68 Ohio St. 2d 120; 429 N.E.2d 141 (1981); *State v. Wilmoth*, 22 Ohio St. 3d 251, especially at 262-263; 490 N.E.2d 1236 (1986).

These cases all stand for the proposition that, in order for the exclusionary rule to apply, there must have been: 1) police

misconduct, which 2) violated some constitutional right. By the Supreme Court of Ohio's suppressing the evidence in this case, it has made the pronouncement that the Fourth Amendment requires a signature on a search warrant in order for that warrant to issue. This reasoning is in direct conflict with the spirit of *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). If the rationale behind the exclusionary rule is to deter police misconduct, then that rationale finds no application here. In this case, there was no police misconduct, only an error on the part of the issuing magistrate. Application of the exclusionary rule here serves no function in furtherence of Fourth Amendment concerns.

There is no legislative mandate in Ohio requiring that evidence taken in violation of Ohio Rev. Code §2933.25 be suppressed. Reference to this statutory provision in the opinion below merely acts to further drive home the point that the Supreme Court of Ohio felt compelled to construe this statutory provision in a way so as to give effect to what it believes is mandated by Fourth Amendment requirements. Violation of this provision alone is not a sufficient basis upon which to suppress the evidence in this case. This is made apparent by prior pronouncements of the Supreme Court of Ohio. See discussion *supra*.

Assuming arguendo the Ohio Constitution would have provided an adequate basis for the judgment below, it is apparent that the Supreme Court of Ohio did not intend to rest its decision independently on the state constitution and this Court therefore has jurisdiction over this case. This is evident from the opinion below where the court states that Article I, §14 of the Ohio Constitution mirrors the Fourth Amendment and by the fact that the Ohio Constitution was always cited in conjunction with the Fourth Amendment. See *Delaware v. Prouse*, __ U.S. __, 99 S. Ct. 1391 (1979); *P.J. Video, Inc.*, *supra*.

Based on the foregoing analysis, the State respectfully submits to this Court that it does have jurisdiction to entertain a review of this case. There is absolutely no indication from the language of the opinion or the syllabus to the case which indicates any intent of the court below to base its decision on purely state grounds. By suppressing the evidence here, the Supreme Court of Ohio has evinced its willingness to raise to a constitutional level the "requirement" for a signature on an

otherwise valid warrant in order for it to issue under the Fourth Amendment.

II. SEARCHES CONDUCTED PURSUANT TO AN UNSIGNED SEARCH WARRANT ARE NOT WARRANTLESS SEARCHES.

The Respondent's assertion that searches conducted pursuant to an unsigned search warrant are warrantless searches begs the very question before this Court. Furthermore, this assertion is in direct conflict with the decisions of other state courts of last resort and the United States Court of Appeals for the Second Circuit. The Respondent's discussion under this proposition actually serves to highlight the fact that this issue is one which is arising more and more frequently in the state courts which in turn consistently come to diametrically opposed conclusions as to what is required by the Fourth Amendment.

Just twenty days after the decision rendered by the Supreme Court of Ohio in this case, the Pennsylvania Court of Appeals handed down its decision that technical errors in the issuance of warrants alone are not enough to invalidate otherwise good warrants. *Commonwealth v. Peticca*, Pa. Super. Ct., No. 392 Philadelphia 1990, 1-29-91, 48 Cr. L. 1417. The Pennsylvania court adopted the position that the State is advocating here; i.e., a search warrant is fatal only if it prevents a reviewing court from later determining whether issuance of the warrant was proper.

The Pennsylvania court's ruling is just one more in a series of inconsistently decided state court decisions which purport to proclaim what the Fourth Amendment requires. A good discussion of this is contained in the State's petition for writ of certiorari and will not be repeated here. However, the State does redirect this Court's attention to *Commonwealth v. Pelligrini*, 405 Mass. 86, 539 N.E.2d 514, *cert. denied*, __ U.S. __, 110 S. Ct. 497, 107 L. Ed. 2d 501 (1989). In that case, this Court let stand the Massachusetts Supreme Judicial Court's ruling that an unsigned search warrant does not violate the Fourth Amendment. That holding is directly counter to the Respondent's argument here. The State submits that by refusing to take this case, this Court will in effect be making a dangerous announcement that state courts are free to decide Fourth Amendment issues, indeed all consitutional issues, in

an inconsistent fashion and that this Court will do nothing to clarify those issues. The State submits that such a practice would run counter to one of the most important functions for which this Court was created - the function of ensuring that the United States Constitution is uniformly interpreted throughout all the fifty states. The position urged upon this Court by the Respondent here would thwart that function.

Based on the foregoing argument and those already presented, the State respectfully urges this Court to grant the State's petition for writ of certiorari so that this important constitutional issue may be finally resolved.

III. THE DECISION OF THE COURT BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The State has already addressed this issue and will not do so again here. However, the State would point out that the issue of whether the warrant in this case was issued upon a good showing of probable cause is not one which is ripe for review. It has not been properly preserved for consideration here, and the State submits that its inclusion in the Respondent's argument at this point merely serves to deflect this Court's attention from the real issue before it. This "smoke screen" effort is improper and should not be condoned. Should this Court have any question about whether probable cause existed or should it decide that that issue is germane to a decision here, the State would direct this Court's attention to the affidavits in the appendix attached to the State's petition and let this Court come to its own conclusion.

The State respectfully requests this Court to find the Respondent's argument here not well-taken and that it not be considered when deciding the issue at hand.

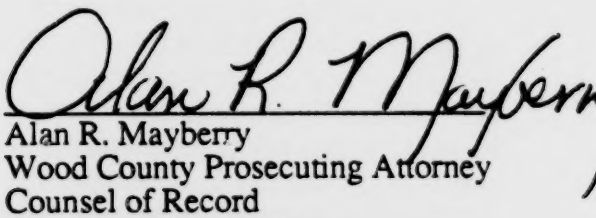
CONCLUSION

The decision of the court below is based on an erroneous interpretation of what is required by the Fourth Amendment and this Court's interpretation of it. It is also in conflict with the decisions of various state courts of last resort, while at the same time being consistent with the decisions of other state courts of last resort. Thus, it is apparent that this issue is one which is generating a great deal of confusion among those

courts. The decision below is also at odds with that of various United States Courts of Appeals. It is not a decision that is based solely on the state constitution as are some of the other opinions cited by the Respondent in support of his position.

The State respectfully submits that this issue is ripe for this Court and that clarification and guidance are needed in order for consistent application of the Constitution of the United States. It is respectfully urged that this Court grant the State of Ohio's petition for writ of certiorari to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,



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